



February 22, 2002

---

---

## ENGROSSED HOUSE BILL No. 1104

---

DIGEST OF HB 1104 (Updated February 21, 2002 3:51 PM - DI 87)

**Citations Affected:** IC 3-13; IC 5-8; IC 36-5.

**Synopsis:** Local government matters. Specifies when a vacancy occurs on a town council. Allows the town council to determine whether a vacancy exists on the council.

**Effective:** July 1, 2002.

---

---

**Ayres, Stevenson, Adams T,  
Saunders, Cheney**

(SENATE SPONSORS — SKILLMAN, ANTICH, ZAKAS, ALEXA)

---

---

January 8, 2002, read first time and referred to Committee on Local Government.  
January 30, 2002, amended, reported — Do Pass.  
February 4, 2002, read second time, ordered engrossed. Engrossed.  
February 5, 2002, read third time, passed. Yeas 96, nays 0.

SENATE ACTION

February 11, 2002, read first time and referred to Committee on Rules and Legislative Procedure.  
February 21, 2002, amended, reported favorably — Do Pass.

---

---

C  
o  
p  
y

EH 1104—LS 6685/DI 87+



February 22, 2002

Second Regular Session 112th General Assembly (2002)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2001 General Assembly.

## ENGROSSED HOUSE BILL No. 1104

---

A BILL FOR AN ACT to amend the Indiana Code concerning elections.

*Be it enacted by the General Assembly of the State of Indiana:*

1       SECTION 1. IC 3-13-9-4 IS AMENDED TO READ AS FOLLOWS  
2 [EFFECTIVE JULY 1, 2002]: Sec. 4. (a) A vacancy in the town  
3 council:

4           (1) not covered by section 1 of this chapter; or

5           (2) covered by section 1 of this chapter, but existing after the  
6           thirtieth day after the vacancy occurs;

7 shall be filled by the remaining members of the council at a regular or  
8 special meeting.

9           (b) The town clerk-treasurer shall give notice of the meeting. ~~which~~  
10 **Except as provided in subsection (d) or (e), the meeting** shall be  
11 held:

12           (1) within thirty (30) days after the vacancy occurs if the vacancy  
13           is not covered by section 1 of this chapter; or

14           (2) within sixty (60) days after the vacancy occurs if the vacancy  
15           **is covered by section 1 of this chapter and** exists for more than  
16           thirty (30) days.

17           (c) The notice must:

EH 1104—LS 6685/DI 87+



C  
o  
p  
y

- (1) be in writing;
- (2) state the purpose of the meeting;
- (3) state the date, time, and place of the meeting; and
- (4) be sent by first class mail to each council member at least ten (10) days before the meeting.

**(d) Notwithstanding subsection (b), if a vacancy:**

- (1) is not covered by section 1 of this chapter; and**
- (2) exists because a circumstance has occurred under IC 36-5-2-6.5(2) through IC 36-5-2-6.5(4);**

**the town council shall meet and select an individual to fill the vacancy not later than thirty (30) days after the town council determines that a circumstance has occurred under IC 36-5-2-6.5(2) through IC 36-5-2-6.5(4).**

**(e) Notwithstanding subsection (b), if a vacancy:**

- (1) is covered by section 1 of this chapter;**
- (2) exists because a circumstance has occurred under IC 36-5-2-6.5(2) through IC 36-5-2-6.5(4); and**
- (3) exists for more than thirty (30) days;**

**the council shall meet and select an individual to fill the vacancy not later than sixty (60) days after the town council determines that a circumstance has occurred under IC 36-5-2-6.5(2) through IC 36-5-2-6.5(4).**

SECTION 2. IC 3-13-11-3 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2002]: Sec. 3. (a) Except as provided in subsection (b) **and section 3.5 of this chapter**, not later than ten (10) days after a vacancy occurs in an office subject to this chapter, the county chairman:

- (1) of the county in which the greatest percentage of the population of the election district of the office is located; and
- (2) of the same political party that elected or selected the official who vacated the office;

shall give notice of a caucus to all eligible precinct committeemen.

(b) A county chairman may give notice of a caucus before the time specified under subsection (a) if a vacancy will exist because the official has:

- (1) submitted a written resignation under IC 5-8-3.5; or
- (2) been elected to another office.

(c) Notwithstanding IC 5-8-4, a person may not withdraw the person's resignation after the resignation has been accepted by the person authorized to accept the resignation less than seventy-two (72) hours before the announced starting time of a caucus under this section.

**(d) Except as provided in section 3.5 of this chapter**, a caucus

C  
o  
p  
y



under this section shall be held after giving notice to caucus members under section 4 of this chapter and not later than thirty (30) days after the vacancy occurs.

SECTION 3. IC 3-13-11-3.5 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2002]: **Sec. 3.5. (a) If a vacancy exists on a town council because a circumstance has occurred under IC 36-5-2-6.5(2) through IC 36-5-2-6.5(4), the caucus shall meet and select an individual to fill the vacancy not later than thirty (30) days after the county chairman receives a notice of the vacancy under IC 5-8-5. If the vacancy is due to the death of a town council member, and the county chairman is aware of the member's death before receiving a notice of the death, the caucus may meet before the county chairman receives the notice of the death.**

**(b) The county chairman shall:**

- (1) give notice of the caucus meeting to caucus members under section 4 of this chapter; and**
- (2) keep the notice of the vacancy with the records of the caucus.**

SECTION 4. IC 5-8-5 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2002]:

**Chapter 5. Notice of a Town Council Vacancy**

**Sec. 1. This chapter applies when a vacancy must be filled under:**

- (1) IC 3-13-9; or**
- (2) IC 3-13-11;**

**due to a reason set forth in IC 36-5-2-6.5(2) through IC 36-5-2-6.5(4).**

**Sec. 2. As used in this chapter, "member" refers to a town council member.**

**Sec. 3. (a) The town council may hold a public meeting to determine whether a circumstance has occurred under IC 36-5-2-6.5(2) through IC 36-5-2-6.5(4) that results in a vacancy on the town council. The town council may set a meeting for making the determination on its own motion, or a person may petition the town council to set a meeting to make the determination. The town council may grant or deny a petition for a meeting.**

**(b) If a person files a petition with the council, the petition must state the basis for the person's claim that a circumstance has occurred under IC 36-5-2-6.5(2) through IC 36-5-2-6.5(4).**



C  
o  
p  
y

1       **Sec. 4. (a) If the town council is reasonably satisfied that any**  
 2       **circumstance has occurred under IC 36-5-2-6.5(2) through**  
 3       **IC 36-5-2-6.5(4), the council may, by an affirmative vote of a**  
 4       **majority of the members appointed to the body, vote to declare a**  
 5       **vacancy in the town council membership. The member who is**  
 6       **alleged to have vacated the member's seat may participate in the**  
 7       **meeting as a member, but may not vote on the issue.**

8       **(b) If the member who is the subject of the petition or motion**  
 9       **does not attend the meeting at which the town council makes the**  
 10       **determination that a vacancy exists, the town council shall mail**  
 11       **notice of its determination to the member.**

12       **(c) If the town council determines that a vacancy exists, the town**  
 13       **clerk-treasurer shall give the circuit court clerk notice of the**  
 14       **determination not later than five (5) days after the date of the town**  
 15       **council's determination. The circuit court clerk shall give notice to**  
 16       **the county chairman if a caucus is required under IC 3-13-11 to fill**  
 17       **the vacancy.**

18       **Sec. 5. The member whose seat is vacated may file an action**  
 19       **under IC 34-17-1 with the circuit court of the county where the**  
 20       **town is located.**

21       **SECTION 5. IC 36-5-2-6.5 IS ADDED TO THE INDIANA CODE**  
 22       **AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY**  
 23       **1, 2002]: Sec. 6.5. A vacancy on the legislative body is created**  
 24       **whenever any of the following circumstances occur:**

25               **(1) A member resigns.**

26               **(2) A member dies.**

27               **(3) A member ceases to be a resident of the town or district as**  
 28               **set forth in section 6 of this chapter.**

C  
o  
p  
y



## COMMITTEE REPORT

Mr. Speaker: Your Committee on Local Government, to which was referred House Bill 1104, has had the same under consideration and begs leave to report the same back to the House with the recommendation that said bill be amended as follows:

Page 2, line 9, delete "IC 36-5-2-6.5(6);" and insert "IC 36-5-2-6.5(4);".

Page 2, line 13, delete "IC 36-5-2-6.5(6)." and insert "IC 36-5-2-6.5(4).".

Page 2, line 17, delete "IC 36-5-2-6.5(6);" and insert "IC 36-5-2-6.5(4);".

Page 2, line 22, delete "IC 36-5-2-6.5(6)." and insert "IC 36-5-2-6.5(4).".

Page 3, line 8, delete "IC 36-5-2-6.5(6)," and insert "IC 36-5-2-6.5(4),".

Page 3, line 29, delete "IC 36-5-2-6.5(6)." and insert "IC 36-5-2-6.5(4).".

Page 3, line 34, delete "IC 36-5-2-6.5(6)" and insert "IC 36-5-2-6.5(4)".

Page 3, line 42, delete "IC 36-5-2-6.5(6)." and insert "IC 36-5-2-6.5(4).".

Page 4, line 3, delete "IC 36-5-2-6.5(6)," and insert "IC 36-5-2-6.5(4),".

Page 4, delete lines 27 through 30.

Page 4, line 31, delete "(4)" and insert "(3)".

Page 4, delete lines 33 through 34.

Page 4, line 35, delete "(6)" and insert "(4)".

Page 4, after line 36, begin a new paragraph and insert:

"SECTION 6. IC 36-7-11.4 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2002]:

**Chapter 11.4. Lincoln Way East Preservation**

**Sec. 1. (a) The purpose of this chapter is to preserve:**

**(1) from deterioration;**

**(2) from improperly conceived or implemented change; and**

**(3) for the continued health, safety, enjoyment, and general welfare of the citizens of Indiana;**

**a historic, scenic, aesthetically pleasing, and unique part of a street lying within Mishawaka constituting the backbone of a unique residential area.**

**(b) The general assembly intends, by passage of this chapter, to:**

**(1) encourage private efforts to maintain and preserve that**

EH 1104—LS 6685/DI 87+



Copy

part of the street and other similar streets and areas in Indiana;

(2) promote orderly and proper land usage; and

(3) preserve significant tourist attractions of historical and economic value in Indiana;

by limiting and restricting unhealthful, unsafe, unaesthetic, or other use of unique areas that would be inconsistent with their character as tourist attractions and with the general welfare of the public.

Sec. 2. As used in this chapter, "bordering property" means a parcel of land any part of which lies within one hundred (100) feet from any part of the right-of-way of Lincoln Way East.

Sec. 3. As used in this chapter, "commission" refers to the Lincoln Way East preservation commission established by this chapter.

Sec. 4. As used in this chapter, "department" refers to the Mishawaka planning department.

Sec. 5. As used in this chapter, "interested party" means any of the following:

(1) The governor.

(2) The Indiana department of transportation.

(3) The department of natural resources.

(4) The executive of Mishawaka.

(5) Each owner or occupant owning or occupying Lincoln Way East or bordering property to a depth of two (2) ownerships of the perimeter of the property.

(6) An owner, occupant, or other person having a legal or equitable interest in a property on Lincoln Way East.

(7) The department.

Sec. 6. As used in this chapter, "Lincoln Way East" refers to that part of an east-west street in the city of Mishawaka, St. Joseph County, known as Lincoln Way East, that lies:

(1) east of South Brook Avenue; and

(2) west of Capital Avenue;

at the points where South Brook Avenue and Capital Avenue intersect with Lincoln Way East.

Sec. 7. As used in this chapter, "notice" means written notice:

(1) served personally upon the person, official, or office entitled to the notice; or

(2) served upon the person, official, or office by placing the notice in the United States mail, first class postage prepaid, properly addressed to the person, official, or office. Notice is

C  
O  
P  
Y



considered served if mailed in the manner prescribed by this subdivision properly addressed to the following:

(A) The governor, both to the address of the governor's official residence and to the governor's executive office in Indianapolis.

(B) The Indiana department of transportation, to the commissioner.

(C) The department of natural resources, both to the director of the department and to the director of the department's division of historic preservation and archeology.

(D) An occupant, to:

(i) the person by name; or

(ii) if the name is unknown, to the "Occupant" at the address of the Lincoln Way East or bordering property occupied by the person.

(E) An owner, to the person by the name shown to be the name of the owner, and at the person's address, as the address appears in the records in the bound volumes of the most recent real estate tax assessment records as the records appear in the offices of the township assessors in St. Joseph County.

(F) The department.

**Sec. 8.** As used in this chapter, "occupant" means a person:

(1) occupying:

(A) under a written lease; or

(B) as an owner; and

(2) using for residential purposes;

a residential dwelling located on Lincoln Way East or bordering property.

**Sec. 9.** As used in this chapter, "owner" means a person who owns a legal or an equitable interest in Lincoln Way East or bordering property.

**Sec. 10.** As used in this chapter, "person" means an individual, a corporation, a partnership, an association, a trust, a governmental body or agency, or other entity, public or private, capable of entering into an enforceable contract.

**Sec. 11. (a)** The Lincoln Way East preservation commission is established.

(b) The commission consists of one (1) owner from each property located on Lincoln Way East.

(c) Members of the commission serve without compensation.



C  
O  
P  
Y



(d) The members of the commission shall elect a chairperson, vice chairperson, and treasurer from among the members of the commission.

Sec. 12. (a) The commission shall prepare, adopt, and promulgate the rules and regulations that are necessary, desirable, or convenient to the orderly administration of commission affairs and to the implementation of this chapter according to its intent and purpose. The rules and regulations shall be made available in writing or electronically to any person requesting a copy.

(b) Notices, petitions, requests, or other written materials to be filed with the commission shall be filed with the department and directed to the attention of the commission. The department shall:

(1) maintain; and

(2) make available for public inspection;

all records of the commission at the offices of the department.

(c) The city attorney for the city of Mishawaka, or a deputy city attorney selected by the city attorney, is the attorney for the commission. The commission may employ other legal counsel that the commission considers necessary, convenient, or desirable.

(d) The rules and regulations of the commission must specify a time for holding regular meetings to consider any matters properly coming before the commission. The commission shall regularly meet at the designated time if there is any matter requiring consideration or determination as specified in this chapter.

Sec. 13. (a) A public officer or office entitled to receive notice may designate in writing filed with the commission alternate or additional persons to whom notice required to be served upon the officer or office shall also be served. The commission shall maintain a complete list of the persons and their addresses.

(b) A person, an official, or an office that is not served notice in the manner prescribed by this chapter is not considered properly notified unless the person has waived notice in writing.

Sec. 14. A person desiring the commission to consider or determine any matter that is within the commission's jurisdiction under this chapter must, at least thirty (30) days before a regular meeting date of the commission upon which the person desires the commission to determine or consider the matter, file with the commission a petition that does the following:

(1) Specifies in detail the matter the petitioner desires the commission to consider or determine.

(2) Requests that the matter be placed upon the commission's docket for matters to be considered and determined at the

C  
o  
p  
y



meeting.

**Sec. 15. (a) The chairperson of the commission:**

- (1) may, in the chairperson's discretion; or**
- (2) shall, at the written request of at least two (2) members of the commission;**

**call a special meeting of the commission to consider or determine a matter for which a petition has been filed.**

**(b) The meeting shall be scheduled for a date:**

- (1) not less than thirty (30); and**
- (2) not more than forty-five (45);**

**days after the filing of the petition.**

**Sec. 16. (a) For good cause shown, the chairperson of the commission may, at or before a regular or special meeting, continue any matter docketed for consideration or determination at the meeting until:**

- (1) the next regular meeting of the commission; or**
- (2) a special meeting set for a date not more than thirty (30) days following the date of the meeting for which the matter was previously docketed.**

**(b) The commission may, before a hearing on a petition filed with the commission, require the person filing the petition, or a person whose interests appear adverse to those of the petitioner, to file with the commission before the hearing the following:**

- (1) Maps, plot plans, structural drawings and specifications, landscaping plans, floor plans, elevations, cross-sectional plans, architectural renderings, diagrams, or any other technical or graphic materials.**
- (2) Additional information concerning the petitioner's or the adverse person's intentions or interest with respect to Lincoln Way East or bordering property.**
- (3) Any other additional information that the commission considers relevant to the matters concerning the petition.**

**Sec. 17. (a) A quorum of the commission consists of a majority of the commission. A quorum must be present for a public hearing on and the determination of a matter coming before the commission for which a public hearing is required under this chapter.**

**(b) Except as otherwise provided in this chapter, a majority vote of the members of the commission is required for the commission to take action.**

**(c) A member of the commission may abstain from voting on a matter if the member states the reasons in the record.**



C  
O  
P  
Y

(d) If by virtue of the abstention of a member of the commission, there is not present at a hearing upon a matter at least a majority of the members of the commission able to vote on the matter, the chairperson shall redocket the matter for a hearing or rehearing at:

- (1) the next regular meeting of the commission; or
- (2) a special meeting set for a date not more than thirty (30) days following the date of the meeting at which the matter was or was to be heard.

Sec. 18. (a) Upon the conclusion of the hearing on a matter and before the voting, the commission members shall, if requested by:

- (1) the petitioner;
- (2) an interested party; or
- (3) a commission member;

deliberate in private before voting.

(b) The commission shall, before voting, consider conditions proposed to the commission at the hearing by a person, including a commission member, concerning the restrictions, limitations, commitments, or undertakings that might be required by the commission as the condition of a vote favorable to the petitioner.

(c) The commission may:

- (1) on the commission's own motion; or
- (2) at the request of a person;

before voting on a matter, continue the matter to a future meeting so that the petitioner and a person appearing adverse to the petitioner might privately agree upon the restrictions, limitations, commitments, or undertakings to be proposed to the commission as a condition to a vote by the commission favorable to the petitioner.

Sec. 19. (a) Not later than thirty (30) days after a vote by the commission finally determining a matter, the commission shall enter a written final order stating the following:

- (1) The names of the members present and voting.
- (2) The total votes cast.
- (3) The basic facts found by the members whose vote for or against the petitioner determined the matter.

(b) If a tie vote occurs, the petition is considered to be determined adversely to the petitioner, with the members casting a vote adverse to the petitioner considered to be the majority.

Sec. 20. (a) If the commission determines affirmatively a matter conditioned upon:

- (1) the observance by a person of a restriction or limitation;

C  
O  
P  
Y



or

(2) the commitment made by or the undertaking of a person; the commission shall, not later than ten (10) days after the vote determining the matter conditionally, enter a temporary order setting forth the restriction, limitation, commitment, or undertaking.

(b) The commission shall enter a final order approving the petition upon and after a hearing at which the petitioner must satisfy the commission that the restriction, limitation, commitment, or undertaking has been formalized so that an interested party may enforce the restriction, limitation, commitment, or undertaking in a private action.

Sec. 21. (a) Not later than five (5) days after the commission has determined a matter by vote, a party who appeared at the hearing shall, upon request of the commission, file with the commission a proposed temporary or final order.

(b) A proposed final order must state in detail the basic facts that could have been found by the commission based upon substantial evidence of probative value actually introduced into evidence before the commission at a hearing on the matter.

(c) A proposed temporary order must state the basic facts:

(1) that could have been found by the commission based upon substantial evidence of probative value actually introduced into evidence before the commission at a hearing on the matter; and

(2) upon which the commission could properly have required a restriction, a limitation, a commitment, or an undertaking as a condition to a final affirmative determination of the matter.

Sec. 22. (a) The commission shall keep complete minutes of meetings. The minutes must reflect the following:

(1) Action taken by the commission.

(2) The reasons for the action.

(3) The factors considered by the commission in taking the action.

(b) Copies of the minutes of a meeting shall be provided to a person requesting a copy.

(c) An interested party who desires a transcript of a matter heard by the commission may, at the interested party's expense, have a transcript prepared.

Sec. 23. (a) The commission shall by rule set fees to be paid by a person filing a petition with the commission. If the commission

C  
o  
p  
y



has not set a fee by rule for a type of petition, the fee is twenty-five dollars (\$25).

(b) A person filing a petition with the commission shall pay the fee required for the filing to the department. The department shall pay the fee to the treasurer of the commission.

(c) The department has no duty regarding the fees collected under this section except those imposed under subsection (b). Fees collected under this section:

- (1) do not belong to Mishawaka; and
- (2) are not subject to any of the following:
  - (A) IC 5-11-10.
  - (B) IC 36-2-6.
  - (C) IC 36-3.
  - (D) IC 36-4-8.

(d) The commission may accept money from any source for use in administering this chapter.

Sec. 24. (a) A person may not construct on Lincoln Way East property a structure or feature or reconstruct, alter, or demolish Lincoln Way East property unless the following conditions have been met:

- (1) The person has previously filed with the commission an application for a certificate of appropriateness in the form and with the plans, specifications, and other materials that the commission prescribes.
- (2) A certificate of appropriateness has been issued by the commission as provided in this section.

(b) After the filing of an application for a certificate of appropriateness, the commission shall determine whether the proposed construction, reconstruction, or alteration of the structure in question:

- (1) will be appropriate to the preservation of the area comprised of Lincoln Way East and bordering property; and
- (2) complies with the architectural and construction standards then existing in the area.

(c) In determining appropriateness, the commission shall consider, in addition to other factors that the commission considers pertinent, the historical and architectural style, general design, arrangement, size, texture, and materials of the proposed work and the relation of the proposed work to the architectural factor of other structures in the area. A permit for the construction, reconstruction, alteration, or demolition of a structure on Lincoln Way East is not valid unless the application for the permit is



C  
O  
P  
Y

accompanied by a certificate of appropriateness.

(d) The issuance of or refusal to issue a permit is a final determination appealable under section 26 of this chapter. With respect to a certificate of appropriateness, the commission may, by rule or regulation, provide for:

- (1) the public hearings;
- (2) notice of the hearings; or
- (3) the filing of the application for the certificate;

that the commission considers necessary.

**Sec. 25. (a) Each owner:**

- (1) has a private right of action to:

- (A) enforce; and
- (B) prevent violation of;

this chapter; and

- (2) may, with respect to Lincoln Way East or bordering property:

- (A) restrain or enjoin, temporarily or permanently, a person from violating; and
- (B) enforce by restraining order or injunction;

this chapter.

**(b) The powers described in subsection (a) include the following:**

- (1) To enforce written commitments, agreements, or covenants made in accordance with or under this chapter.
- (2) To prevent and obtain full relief from a threatened or existing violation of this chapter.

**(3) To:**

- (A) prevent construction, reconstruction, alteration, or demolition work upon; and
- (B) obtain full relief from work previously done upon;

Lincoln Way East property for which a certificate of appropriateness was required but was not issued by the commission. A showing that issuance of certificates of appropriateness for the work could not properly have been denied by the commission if a proper application had been made is a complete defense to an action under this subdivision.

**(4) To prevent further construction work upon and obtain full relief from construction work previously done upon Lincoln Way East property that fails in a substantial manner to comply with all the terms and conditions:**

- (A) of a certificate of appropriateness issued by the commission; or

C  
O  
P  
Y



(B) of the petition and documents filed with the commission upon which the commission is presumed to have based approval of the certificate.

(c) For purposes of obtaining relief sought under this section, it is not necessary to allege or prove irreparable harm or injury to a person or property. A person entitled to bring an action under this section is not required to post a bond unless the court, after a hearing, determines that a bond should be required in the interests of justice. A person who brings an action under this section is not liable to a person for any damages resulting from the bringing or prosecuting of the action unless the action was not brought:

(1) in good faith; or

(2) in the reasonable belief that:

(A) this chapter; or

(B) a commitment, an agreement, or a covenant entered into under this chapter;

had been or was about to be violated or breached.

(d) The person against whom an action is brought under subsection (a) is liable to the interested party bringing the action for reasonable attorney's fees and court costs if judgment is entered by the court against the person.

(e) An action arising under this section must be brought in the circuit or superior court of St. Joseph County, and a change of venue from the county is not permitted.

(f) The remedy provided in this section is not exclusive but is cumulative to any other remedies available.

Sec. 26. (a) A final determination by the commission is subject to judicial review. An interested party aggrieved by a determination may file with the circuit or superior court of St. Joseph County a verified petition for writ of certiorari stating that the determination is illegal in whole or part. The petition must be filed not later than sixty (60) days after the date of the final determination. A change of venue is not permitted in a cause of action arising under this section.

(b) Upon the filing of a petition for writ of certiorari, the petitioner shall have a copy of the petition served upon each interested party in the manner provided in this chapter for service of notice. Upon adequate showing by the petitioner that a copy of the petition has been served, the circuit or superior court shall enter an order directing the commission to show cause not later than thirty (30) days after the entry of the order why a writ of certiorari should not issue. If the commission or an interested

C  
o  
p  
y



party appearing in support of the commission's determination fails to show to the satisfaction of the court that a writ should not issue, the court may allow a writ directed to the commission. The writ must prescribe the time in which a return shall be made to the court. The time:

- (1) may not be less than twenty (20) days after the date of the issuance of the writ; and
- (2) may be extended by the court on application and on notice to all parties.

(c) The return to the writ of certiorari by the commission must contain copies of all filings, exhibits, and other matters presented to or considered by the commission in connection with the matter and the determination from which the appeal is taken, including a verbatim transcript of the proceedings at each public hearing that was held. The commission shall prepare the return at the expense of the party that filed the petition for certiorari. The return to the writ of certiorari must also show the grounds of the decision that was appealed.

(d) The court may decide and determine the sufficiency of the statements of illegality contained in the petition without further pleadings and may make a determination and enter judgment with reference to the legality of the decision of the commission on the facts set out in the return to the writ of certiorari. If the court determines that testimony is necessary for the proper disposition of the matter, the court may take evidence to supplement the evidence and facts disclosed by the return to the writ of certiorari. However, a review may not be by a trial de novo, and the court may not consider evidence that should properly or could have been presented to the commission. In passing on the legality of the determination by the commission, the court may:

- (1) reverse;
- (2) affirm, wholly or in part; or
- (3) modify;

the determination of the commission brought up for review. Costs may not be allowed against the commission.

(e) Upon the filing of a petition under this section, the final determination of the commission with respect to which the petition is filed is considered without force and effect pending a final judgment by the court. If the final determination was made with respect to a petition for approval of a proposed rezoning or zoning variance, the approval by the commission is considered nonexistent pending final judgment.



C  
O  
P  
Y



**Sec. 27. An appeal may be taken to the Indiana court of appeals from the final judgment of the court under section 26 of this chapter reversing, affirming, or modifying the determination of the commission in the same manner and upon the same terms, conditions, and limitations as appeals in other civil actions.**

**Sec. 28. This chapter is cumulative to and does not supersede, preempt, or invalidate a zoning, building, health, or other law, ordinance, or code in effect as of June 30, 2002, except to the extent the law, ordinance, or code is in irreconcilable conflict with this chapter. If an irreconcilable conflict exists, only those parts of the law, ordinance, or code that conflict with this chapter are inapplicable as the parts pertain to the subject matter of this chapter."**

and when so amended that said bill do pass.

(Reference is to HB 1104 as introduced.)

STEVENSON, Chair

Committee Vote: yeas 12, nays 2.

C  
o  
p  
y



## COMMITTEE REPORT

Mr. President: The Senate Committee on Rules and Legislative Procedure, to which was referred House Bill No. 1104, has had the same under consideration and begs leave to report the same back to the Senate with the recommendation that said bill be AMENDED as follows:

Page 4, delete lines 29 through 42.

Delete pages 5 through 14.

Page 15, delete lines 1 through 15.

and when so amended that said bill do pass.

(Reference is to HB 1104 as printed January 31, 2002.)

GARTON, Chairperson

Committee Vote: Yeas 8, Nays 0.

C  
o  
p  
y

